NAGA JAGUH DEVELOPMENT SDN BHD

v.

DANAHARTA URUS SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[SUIT NO. 22-161-2004]
28 JULY 2005

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Orders for specific performance and to compel return of earnest money - Whether court empowered to grant such orders against Danaharta Urus Sdn Bhd - Pengurusan Danaharta Nasional Berhad Act 1998, s. 72*

CONTRACT: *Specific performance - Whether precluded by Pengurusan Danaharta Nasional Berhad Act 1998, s. 72*

CIVIL PROCEDURE: *Specific performance - Danaharta Urus Sdn Bhd - Whether order for specific performance against Danaharta Urus Sdn Bhd precluded by Pengurusan Danaharta Nasional Berhad Act 1998, s. 72*

CIVIL PROCEDURE: *Judgments and orders - Limits on the grant of orders of court - Orders for specific performance and to compel refund of earnest money sought against Danaharta Urus Sdn Bhd - Whether grant of such orders precluded by Pengurusan Danaharta Nasional Berhad Act 1998, s. 72*

CIVIL PROCEDURE: *Striking out - Grounds for - Specific performance sought against Danaharta Urus Sdn Bhd - Whether claim obviously unsustainable - Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)*

The defendant – a wholly-owned subsidiary of Pengurusan Danaharta, pursuant to its rights under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act') put up for sale two pieces of land ('the land'). The plaintiff responded with a conditional offer and earnest money of RM150,000. The defendant accepted the conditional offer. The offer provided for the forfeit of the plaintiff's earnest money in the event the plaintiff failed to execute the Sale and Purchase agreement ('SPA') within the stipulated time. However, it was later discovered that subsequent to the defendant's acceptance, a third party had entered a caveat on the land. The plaintiff then requested for numerous

amendments to be made to the SPA and attempted to impose several conditions precedent for completion of the sale. The defendant refused to accede to all those conditions. On the plaintiff's refusal to execute the SPA, the defendant terminated the proposed sale transaction and forfeited the plaintiff's earnest money. The defendant later sold the land to a third party. The plaintiff thus sought: (i) to declare the SPA subsisting, (ii) specific performance of the SPA; and (iii) the return of the earnest money with interest. The defendant applied to strike out the plaintiff's action.

Held (allowing the defendant's application):

[1] The order for specific performance sought by the plaintiff was an order that was bound to affect the action taken by the defendant in relation to the termination of the proposed sale to the plaintiff and the subsequent sale of the land to a third party. The court was not empowered to grant such an order upon a true construction of s. 72(b) of the Act. The orders sought for specific performance and to compel the defendant to refund the earnest money was also contrary to s. 72(c) of the Act. Section 72 of the Act expressly conferred upon the defendant *carte blanche* insulation and immunity. (p 823 a-c)

[2] What was said by the Court of Appeal in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378, in relation to injunctive relief in that case, was applicable *mutatis mutandis* to any order at all, including as in the instant case, all the orders sought by the plaintiff. The terms of s. 72(b) and (c) were clear and unambiguous. *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378 (refd). (p 823 f)

[3] Where a claim or pleading is shown to be obviously unsustainable, any limb of O. 18 r. 19(1) of the RHC 1980, may be invoked. In the instant case, the defendant had shown that the plaintiff's case fell under O. 18 r. 19(1)(b) or (d).

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd [2003] 3 CLJ 378 CA ***(refd)***

Sarjit Singh Khaira v. Government of The State of Sarawak & Anor [1990] 2 CLJ 95; [1990] 3 CLJ (Rep) 59 HC ***(refd)***

Legislation referred to:
Pengurusan Danaharta Nasional Berhad Act 1998, s. 72(b), (c)
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

For the plaintiff - Hillary D'Cruz (Bala Gopal with him); M/s Bala Gopal & Assoc
For the defendant - Yoong Sin Min (Stephanie Foo with her); M/s Shook Lin & Bok

Reported by Andrew Christopher Simon

JUDGMENT

Low Hop Bing J:

Application

The defendant's application in enclosure (13) herein seeks an order to strike out the plaintiff's claim pursuant to O. 18 r. 19(1)(b) or (d) of the Rules of the High Court 1980 on the ground that it is scandalous, frivolous or vexatious; or it is otherwise an abuse of the process of the court, respectively, and under the inherent jurisdiction of the court.

For brevity and convenience, a reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980, unless otherwise stated.

Factual Background

Vide a vesting certificate dated 31 July 1999, the defendant a wholly-owned subsidiary of Pengurusan Danaharta had acquired a loan granted to one Ayer Keroh Heights by Bank Bumiputra Malaysia Bhd as well as the security therefor over two pieces of land ("the land"). The land was to be sold by the defendant pursuant to its rights under the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Act").

A reference hereinafter to a section is a reference to that section in the Act unless otherwise stated.

The defendant has put up the land for sale by tender, and the plaintiff had on 2 July 2003 submitted its tender with an earnest money of RM150,000 ("the earnest money") to the defendant offering to buy the land at a consideration of RM5 million.

The plaintiff's offer was on the basis that:

1. the sale by the defendant was on an "as is where is" basis;

2. a sale and purchase agreement ("SPA") as per defendant's format be entered into within 14 days of defendant's acceptance; and

3. in the event the plaintiff fails to execute the SPA within the stipulated time, defendant can forfeit the earnest money.

On 26 August 2003, defendant accepted the plaintiff's offer conditional upon, *inter alia*, conditions 1 and 2 above, in addition to the terms and conditions of the SPA to be drafted by the defendant's solicitors.

On 12 September 2003, the first draft of the SPA was delivered to the plaintiff for execution and payment of 10% of the said consideration by way of deposit.

It was then discovered that a private caveat has been entered on the land on 3 September 2003 by one SGB Construction Sdn Bhd ("the caveat").

On 19 September 2003, the plaintiff requested the defendant to amend the draft SPA to reflect the existence of the caveat. As the caveat was entered prior to the expiry of the 14 days in which the SPA had to be executed, the defendant has agreed to the amendment.

On 1 October 2003, a second draft of the SPA was sent to the plaintiff with a request for it to be executed by 3 October 2003, and the draft referred to the caveat. One of the conditions precedent for completion of the sale was the removal of the caveat. There was also a provision for a cut-off date for completion of the sale and the consequences if the conditions precedent were not fulfilled by the cut-off date. The plaintiff refused to execute the draft but insisted that the caveat must first be removed.

On 23 October 2003, the plaintiff made a request for further amendments to the SPA including an extension of the cut-off date for, *inter alia*, fulfilling the conditions precedent.

The defendant agreed to some of the plaintiff's request for amendments but not the amendment seeking to extend the cut-off date which was already six months from the date of the SPA, and which may be extended for three more months or such further date as mutually agreed in writing.

On 12 December 2003, defendant's solicitors sent a third draft of the SPA to plaintiff's solicitors and requested the execution by the plaintiff within seven days thereof, but the plaintiff had refused to do so, as a result of which the defendant had terminated the proposed sale of the land to the plaintiff whose earnest money was also forfeited by the defendant. The defendant has since sold the land to a third party.

Hence, the plaintiff's action herein for a declaration that the SPA is still subsisting, specific performance of the SPA and costs.

Alternatively, the plaintiff prays for a refund of the earnest money with 8% p.a. from the date of defendant's receipt thereof, to the date of realisation, and costs.

Section 72

Learned counsel Miss Yoong Sin Min, Miss Stephanie Foo with her, relied on s. 72(b) and (c) and submitted that the defendant has terminated all negotiations with the plaintiff for the sale of the land, which has already been sold to a third party, so that all the orders sought by the plaintiff in this action cannot be granted by the court. Reference was made to *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 FC.

Plaintiff's learned counsel Mr. Hillary D'Cruz and Mr. Bala Gopal responded that in *Kekatong Sdn Bhd, supra*, the Federal Court was only concerned with the constitutionality of s. 72 in relation to an action which is "injunctive" in nature and that the plaintiff herein is not attempting to stay or restrain the defendant under s. 72(b) from doing any action under the Act. They added that s. 72(c) is limited to a mandatory injunction in futuro, which is also not sought by the plaintiff herein.

From the above submissions, I am of the view that the sole question for determination by me may be formulated as follows:

> Upon a true construction of s. 72(b) and (c) of the Pengurusan Danaharta Nasional Berhad Act 1998, is the plaintiff's claim against the defendant scandalous, frivolous, or vexatious, or is otherwise an abuse of the process of the court in the sense that it is obviously unsustainable?

For this purpose, I shall refer to the relevant portion of s. 72(b) and (c) as follows:

> **72. Limits on the grant of orders of court.**
>
> Notwithstanding any law, an order of the court cannot be granted:
>
> (a) …
>
> (b) which stays, restrains or affects any action taken, … by the Corporation … under this Act;
>
> (c) which compels the Corporation … to do or perform any act,
>
> and any such order, if granted, shall be void and unenforceable …

The validity and constitutionality of s. 72 has been confirmed by the Federal Court through the judgment of Augustine Paul JCA (now FCJ) in *Kekatong Sdn Bhd, supra*.

In my judgment, upon a true construction of s. 72(b), the court is not empowered to grant an order which eg, affects any action taken by the corporation ie, the defendant under the Act. The order for specific performance sought by the plaintiff is an order which is bound to affect the action taken by the defendant in relation to the termination of the proposed sale to the plaintiff and the subsequent sale of the land to a third party, and the grant of that order is prohibited as it would clearly contravene s. 72(b).

In the same vein, s. 72(c) also disentitles the court from granting an order which compels the defendant to do or perform any act. The order for specific performance and indeed the order compelling the defendant to refund the earnest money alternatively sought by the plaintiff would come squarely and precisely within the ambit and purview of s. 72(c).

Section 72 is a *carte blanche* insulation and immunity expressly conferred by Parliament on the defendant under the Act.

Although the decision of the Court of Appeal in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378 has been reversed by the Federal Court in relation to the validity and constitutionality of s. 72, the judgment of Gopal Sri Ram JCA in the Court of Appeal in relation to the net effect of s. 72 is still relevant. The learned judge observed that s. 72 prohibits a court from, *inter alia*, granting an injunction against the second defendant there which is the defendant herein, and that the section seeks to immunise the defendant from being restrained in any manner whatsoever ie, the defendant enjoys blanket immunity from injunctive relief.

In my view, what has been said by the Court of Appeal in relation to injunctive relief there is applicable mutatis mutandis to any order at all including all the orders sought by the plaintiff herein as the terms of s. 72(b) and (c) are clear and unambiguous.

Principles Governing O. 18 r. 19

The principles governing O.18 r19 have been set out in a long line of authorities eg, *Sarjit Singh Khaira v. Government of The State of Sarawak & Anor.* [1990] 2 CLJ 95, 97; [1990] 3 CLJ (Rep) 59 HC per Haidar Mohd Noor J later CJ (M); and *Bandar Builder Sdn. Bhd. & 2 Ors. v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7, 11 SC per Mohamed Dzaiddin bin Hj Abdullah FCJ (later CJ (Malaysia)). In a nutshell, the gist is that where a claim or pleading is shown to be obviously unsustainable, any limb of O. 18 r. 19(1) may be invoked. On the facts and the law, I am of the view that the defendant has shown that the plaintiff's case falls under O. 18 r. 19(1)(b) or (d), and so I am unable to accept the contention presented for the plaintiff.

Other Issues

In the light of my finding above, it appears to me that other issues, in particular whether there is a valid and enforceable contract subsisting between the parties herein, raised by the respective learned counsel, have been rendered irrelevant and so would not require my consideration and determination.

However, for the enormous efforts which the respective learned counsel have so commendably expended, I wish to place on record my appreciation.

Conclusion

On the foregoing grounds, my answer to the above question is in the affirmative. I therefore make an order in terms of defendant's application in enclosure (13).